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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

KHOSROW TAHERI, Plaintiff and Respondent, v. MANSOUR RABEI, Defendant and Appellant.	B176055 (Los Angeles County Super. Ct. No. SC071483)

APPEAL from an order of the Superior Court of Los Angeles County, Lorna Parnell, Judge. Affirmed.

Damon Heilweil for Defendant and Appellant.

Oscar E. Toscano for Plaintiff and Respondent.

Defendant and appellant Mansour Rabei (Rabei) appeals an order denying his motion to vacate an entry of default and a $361,770 default judgment obtained by plaintiff and respondent Khosrow Taheri (Taheri).[1]

Rabei contends the default judgment is void because the proof of service of the summons was false, the application for entry of default was defective, the pleading was at variance with the proof, and the damages were not set forth with particularity and were excessive.

We reject Rabei's contentions in their entirety and affirm the trial court's order refusing to set aside the entry of default and default judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Events leading up to entry of default judgment*.

On July 16, 2002, Taheri filed suit against Rabei for assault and battery. The complaint alleged that Taheri was the invited speaker at a bookstore in Westwood on September 17, 2001, six days after the September 11 attacks, an altercation took place during the lecture, the altercation continued outside, at which time Rabei struck Taheri.

On September 9, 2002, Rabei was personally served with the summons and complaint.

On February 12, 2002, Taheri completed a statement of damages, seeking general damages of $250,000 for pain and suffering and $100,000 for emotional distress, as well as special damages consisting of $11,438 in medical expenses to date, $54,000 in future medical expenses, $85,000 for loss of earnings, $300,000 for loss of future earning capacity, and $500,000 in punitive damages.

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[1] The order is appealable as an order after judgment. (§ 904.1, subd. (a)(2); 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 154, p. 218.)

All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

On February 26, 2003, Rabei was personally served with the statement of damages.

On June 23, 2003, Taheri filed a request for entry of Rabei's default, as well as a request for a default judgment in the sum of $1,309,770. The clerk did not enter the default due to the lack of "proper service as to statement of location."

On July 25, 2003, Taheri filed another request for entry of default and default judgment. The clerk again did not enter default, this time due to lack of "proof of service of statement of damages."

On July 29, 2003, Taheri filed a third request for entry of default and default judgment. This time, the clerk entered Rabei's default.

Following the entry of default, the trial court issued an order to show cause for failure to proceed with the default proveup. On August 14, 2003, Taheri filed a trial brief, a declaration and exhibits in support of his request for a default judgment. The matter was considered on plaintiff's written declaration, pursuant to section 585, subdivision (d).[2]

On August 14, 2003, the trial court awarded Taheri damages in the sum of $361,438 plus costs of $332, for a total default judgment of $361,770.

On August 19, 2003, the trial court discharged the order to show cause because the default judgment had already been entered. The August 19, 2003 minute order added: "In regard to the request for Court Judgment, the Court notes the following: Plaintiff did not submit any evidence in support of plaintiff's claim for past or future lost earnings. Plaintiff did not submit any evidence of defendants' financial worth which is required before punitive damages can be awarded."

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[2] Section 585, subdivision (d), provides "the court in its discretion may permit the use of affidavits, in lieu of personal testimony, as to all or any part of the evidence or proof required or permitted to be offered, received, or heard in such cases."

2. *Rabei's failed attempt to vacate the default and default judgment.*

On February 11, 2004, nearly six months after the default judgment was entered, Rabei filed a motion to vacate the entry of default and default judgment. Rabei asserted the default and default judgment were the product of mistake, inadvertence, surprise or excusable neglect, and he invoked section 473 as well as the trial court's equitable powers.

Specifically, Rabei contended the judgment should be vacated because (1) he did not have actual notice of the action; (2) the judgment is void because of improper proofs of service filed with the court; and (3) it would be inequitable to permit Taheri to maintain a judgment because Rabei had a meritorious defense. According to Rabei, he was unaware of the default and default judgment until December 2003, when he received an order to appear for examination.

As for the proofs of service, Rabei claimed they were defective in two particulars. The proof of service of the summons and complaint, reflecting personal service on Rabei on September 9, 2002, indicated it was executed by the process server on September 25, 2002, one day after it was filed with the court on September 24, 2002. Also, the proofs of service by mail failed to state a proper mailing address in that the zip code was omitted.

In opposition, Taheri submitted a declaration from Marco Toscano, the process server, who stated he personally served Rabei with: the summons and complaint on September 9, 2002; the statement of damages on February 28, 2003; and the order to appear for examination on December 4, 2003, and that on the second and third occasions, he recognized Rabei as the same person whom he served on the initial occasion.

On March 30, 2004, the matter came on for hearing and was taken under submission. Thereafter, the trial court issued an order denying Rabei's motion to vacate the entry of default and default judgment.

This appeal followed.[3]

CONTENTIONS

Rabei contends the default and default judgment must be set aside because: the proof of service of the summons is false on its face in that it was allegedly signed one day after it was filed with the court; the default application was defective for lack of a declaration of nonmilitary status and the omission of the zip code on the mailing address; the judgment was based on facts not pled because the complaint alleged the incident occurred on September 17, 2001 and the declaration in support of the default proveup indicated the incident date was September 16, 2001; the damages were not set forth with sufficient particularity; and the damages awarded were excessive and unjust.

DISCUSSION

1. *Standard of appellate review*.

We review the trial court's order denying Rabei's motion for relief under section 473 for an abuse of discretion. (*Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233.)

2. *No merit to Rabei's contention the proof of service of the summons was false on its face*.

The proof of service of the summons and complaint reflects that on September 9, 2002, Rabei was personally served with the summons and complaint. The proof of service indicates it was signed by the process server on September 25, 2002, and filed with the court on September 24, 2002.

Rabei contends that because the proof of service was allegedly signed one day after it was filed with the court, it is facially false and cannot be the basis for a default judgment.

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[3] In addition to seeking review of the order denying the motion to vacate the judgment, the notice of appeal, filed May 28, 2004, purports to seek review of the

Taheri points out a perfectly plausible explanation for this discrepancy. The proof of service was prepared and signed on September 25, 2002, and was filed with the superior court on the same date. However, due to the failure of the court clerk to change the date of the stamp, the proof of service was file stamped with the previous day's date, September 24, 2002.

Accordingly, on the motion to vacate the default and default judgment, the trial court acted within its discretion in rejecting Rabei's claim that Taheri filed a false proof of service.

3. *No merit to Rabei's contention the default applicat*ion *was defective.*

a. *Declaration of nonmilitary status*.

Rabei asserts the default application was defective because it lacked a declaration of nonmilitary status. The argument flies in the face of the record.

Although Rabei's appellate appendix omitted the second page of the two-page Judicial Council form application for entry of default, Taheri's appendix includes both pages. Page two of the form, at section eight, contains a duly completed declaration of nonmilitary status, stating "[n]o defendant named in item 1c of the application is in the military service so as to be entitled to the benefits of the Soldiers' and Sailors Civil Relief Act of 1940 . . . ."

Therefore, this argument is patently without merit.

b. *Omission of zip code from declaration of mailing*.

Rabei further contends the request for entry of default was defective because it states the request was mailed to him, but the mailing address shown on the declaration of mailing did not include a zip code.

The declaration of mailing indicates the request for entry of default was mailed on July 24, 2003 to: "Mansour Rabei" at "1355 S. Westwood Blvd., #206, Los Angeles, Calif."

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underlying default judgment, entered August 14, 2003. The direct appeal from the judgment is clearly untimely. (Cal. Rules of Court, rule 2(a).)

The mailing address, as shown, was sufficient to ensure delivery. Further, a quick check of the United States Postal Service website indicates the full nine-digit zip code for this address is 90024-4944 and was readily ascertainable in the event it were needed for delivery. While specification of the zip code might have expedited delivery, we do not presume its omission precluded delivery to Rabei.[4]

4. *No merit to contention the judgment is based on unpled facts.*

A default judgment may be attacked for "fundamental" defects in pleading. (*Uva v. Evans* (1978) 83 Cal.App.3d 356, 363; *City Bank of San Diego v. Ramage* (1968) 266 Cal.App.2d 570, 582.)

Rabei contends the judgment is void because the complaint pled the incident occurred on September 17, 2001 but the declaration in support of default proveup indicated the incident occurred one day earlier, on September 16, 2001.

This variance between the pleadings and proof was trivial and could not have misled either Rabei or the trial court.

5. *No merit to attack on damages award.*

a. *The requirement of setting forth facts with particularity*.

Rabei contends Taheri's proveup declaration failed to set forth his damages with sufficient particularity.

In this regard, section 585, subdivision (d), pertaining to default proveups, provides: "The facts stated in such affidavit or affidavits shall be within the personal knowledge of the affiant and shall be set forth with particularity, and each affidavit shall show affirmatively that the affiant, if sworn as a witness, can testify competently thereto."

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[4] In the moving papers below, Rabei also contended "each and every proof of service fails to properly state Defendant's name, which is Mansour Rabei, not Mansour Rabei [*sic*]." Rabei's complaints regarding the misspelling of his name were meritless. We note his own notice of motion spelled his name as "Rabei" and alternatively, as "Rabie."

Here, Taheri's declaration set forth the incident and his damages in some detail. Rabei hit Taheri in the face, causing Taheri to lose consciousness. Taheri suffered ringing in the ear, burning to the right eye and right ear, developed bruises, suffered excruciating headaches, swelling, and tooth and jaw pain. One tooth had to be removed. The crown of another tooth came off. He developed TMJ syndrome as a result of the incident. He suffered hearing loss, consulted an audiologist and was fitted with a hearing aid. He requires three or four dental implants which will have to be done in the future. He has been seeing a psychologist and a psychiatrist. He has suffered emotional distress, lack of concentration, sleeplessness, loss of appetite, depression and anxiety.

We find the above recitation set forth the evidence with sufficient particularity and reject Rabei's contention that Taheri should have filed a more perfect declaration.

b. *Alleged excessiveness of damages.*

Rabei contends that even if this court were to find Taheri set forth the facts with sufficient particularity, the damages award of $361,438 is unjust and excessive.

A defaulting defendant may attack the amount of a default judgment on appeal on the ground it is excessive as a matter of law. (*Uva v. Evans, supra,* 83 Cal.App.3d at pp. 362-364.) *Uva* sets for the applicable standard: "The power of an appellate court to review the trier of fact's determination of damages is severely circumscribed. An appellate court may interfere with that determination only where the sum awarded is so disproportionate to the evidence as to suggest that the verdict was the result of passion, prejudice or corruption [citations] or where the award is so out of proportion to the evidence that it shocks the conscience of the appellate court. [Citations.]" (*Uva, supra,* 83 Cal.App.3d at pp. 363-364.)

Taheri's proveup declaration established he suffered substantial injuries, including severe emotional distress, dental problems and permanent hearing loss. We decline to second guess the trial court's determination Taheri was entitled to a sizable award of general damages.

c. *No requirement of any particular correlation between special and general damages.*

Finally, Rabei contends the judgment is infirm because the special damages discernible from the exhibits amount to $12,158, and the judgment awarded damages almost 30 times this number.

The argument is unavailing. There is no requirement of any particular ratio between general and special damages. What is required is that the damages awarded not be disproportionate to the evidence. As *Uva* states, an appellate court may interfere with the trier of fact's determination of damages where "the sum awarded is so disproportionate to the evidence as to suggest that the [award] was the result of passion, prejudice or corruption [citations] or where the award is so out of proportion to the evidence that it shocks the conscience of the appellate court. [Citations.]" (*Uva, supra*, 83 Cal.App.3d at pp. 363-364.)

Given the showing made by Taheri, the amount of the award does not shock this court's conscience.

DISPOSITION

The order is affirmed. Taheri shall recover costs on appeal.

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KLEIN, P.J.

We concur:

KITCHING, J.

ALDRICH, J.